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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 D.H. EVERS on behalf of the UNDERWRITING
11 MEMBERS OF SYNDICATE 535 AT
LLOYDS,

12 Plaintiff,

13 v.

14 PURSE SEINE VESSEL OWNERS
15 ASSOCIATION, a Washington corporation, and
F/V ALEUTIAN SPIRIT, INC., an Alaska
corporation,

16 Defendants.
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CASE NO. C09-791RSM

ORDER ON MOTION FOR SUMMARY
JUDGMENT

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19 This case arises from a dispute over insurance coverage for an injury that occurred aboard the
20 *F/V Aleutian Spirit*. Plaintiff D. H. Evers, on behalf of the Underwriting Members of Syndicate 535 at
21 Lloyd's ("Syndicate 535") seeks a declaratory judgment that it has no further obligation to either
22 defendant in connection with a policy of marine insurance in effect from October 1, 2001 to October 1,
23 2002. Amended Complaint, Dkt. # 1. In answering the amended complaint, defendants asserted
24 counterclaims against plaintiff for breach of contract, bad faith, and violation of the Washington
25 Consumer Protection Act. Dkt. # 8. The matter is now before the Court for consideration of plaintiff's
26 motion for summary judgment on all claims. Dkt. # 40. Defendants have opposed the motion. After
27 careful consideration of the parties' memoranda and exhibits, together with controlling law, the Court
28 concludes that the motion should be granted in part and denied in part.

1 BACKGROUND

2 The relevant facts are not in dispute. Defendant Purse Seine Vessel Owners Association
3 (“PSVOA”) is a non-profit Washington organization with its principal place of business at Seattle,
4 Washington. The purpose of the organization is to further the interests of the commercial fishing fleet.
5 Through its affiliate, Seine Vessels’ Reserve (“SVR”), PSVOA operates an insurance pool to provide
6 insurance to member vessels, including the *F/V Aleutian Spirit*. Defendant Aleutian Spirit, Inc.
7 (“ASI”), owner of the *F/V Aleutian Spirit*, is an Alaskan corporation with principal place of business at
8 Petersburg, Alaska.

9 In 2001, PSVOA sought “stop loss” insurance to cover its pool liabilities in excess of an annual
10 aggregate of \$2.2 million. Through a broker, Accordia Northwest, SVR purchased policy No.
11 PMH2045/01, which provided coverage for all types of marine liability, up to \$1 million per occurrence
12 per insured vessel. This \$1 million limit “erodes” as expenses are incurred on a given claim. National
13 Casualty Company, not a party here, and Syndicate 535 each subscribed to 50% of the policy issued.
14 PSVOA, SVR, and “Individual Certificate Holders as Declared” are named as insureds on the policy.
15 The *F/V Aleutian Spirit* is named as a Certificate Holder on a 2002 endorsement to the policy. The
16 period of the policy was from October 1, 2001 to October 1, 2002.

17 In April 2002, Jason Miller, a crew member on the *F/V Aleutian Spirit*, was injured when he
18 slipped on an icy ramp while boarding the ship. Jason Miller is the son of James Miller, the ship’s
19 master and a primary shareholder in ASI. Jason Miller sued the owner of the vessel, ASI, in Alaska to
20 recover damages for his injury. The matter was tried to the court in 2007, resulting in an award of
21 damages to Jason Miller of \$768,417, as set forth in Amended Findings of Fact and Conclusions of Law
22 dated August 22, 2007. Declaration of Nicolas Vikstrom, Dkt. # 41, Exhibit F. This amount did not
23 include interest, costs, and attorneys fees, all of which remained to be calculated, but which appeared
24 likely to push the final judgment well over \$1 million. Before judgment was entered, Jason Miller’s
25 attorney offered to settle the matter for \$1 million. On December 7, 2007, coverage counsel for
26 National Casualty Company sent written acceptance of the offer to plaintiff. Declaration of Robert
27 Zuanich, Dkt. # 62, Exhibit 4.

28 The final total of all PSVOA’s expenses related to Jason Miller’s claim reached \$1,253,642.14.

1 National has paid a 50% share of this amount, but Syndicate 535 has not. Syndicate 535 asserts that it
2 was bound to pay only a 50% share up to the policy limit of \$1 million, and that it is not bound by
3 National's *ex gratis* payment over that amount. Defendants, in their counterclaim, allege that Syndicate
4 535 still owes PSVOA \$131,460. Answer and Counterclaim, Dkt. # 8, ¶¶ 26-27. As noted above,
5 plaintiff filed this action asking for a declaratory judgment that it owes nothing further to PSVOA. In
6 this summary judgment motion, plaintiff contends PSVOA is barred from seeking further payment by a
7 one-year limitation for suit set forth in the policy. This provision states, in relevant part,

8 No action shall lie against this Company for the recovery of any loss sustained by the
9 assured unless such action is brought within one year after the entry of any final judgment
10 or decree in any litigation against the assured, or in the event of a claim without the entry
of such final judgment or decree, unless such action is brought within one year from the
date of the payment of such a claim.

11 SP-38 Protection and Indemnity Clause, Dkt. # 41, Exhibit A, p. 38.

12 Enforcement of this provision would bar defendants' counterclaims for breach of contract, and
13 would result in a declaratory judgment in plaintiff's favor. Defendants' position is that this provision is
14 unenforceable under Alaska law, and that under either Washington or Alaska law, plaintiff is estopped
15 by its conduct from enforcing the one-year limitation. In order to decide this summary judgment
16 motion, the Court must determine what law applies.

17 DISCUSSION

18 I. Legal Standard

19 Summary judgment should be rendered "if the pleadings, discovery and disclosure material on
20 file, and any affidavits show there is no genuine issue as to any material fact and that the movant is
21 entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if "a reasonable
22 jury could return a verdict for the nonmoving party" and a fact is material if it "might affect the outcome
23 of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The
24 evidence is viewed in the light most favorable to the non-moving party. *Id.* "[S]ummary judgment
25 should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could
26 return a verdict in its favor." *Triton Energy Corp. v. Square D Co.*, 68 F. 3d 1216, 1221 (9th Cir. 1995).
27 It should also be granted where there is a "complete failure of proof concerning an essential element of
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1 the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The mere existence
2 of a scintilla of evidence in support of the non-moving party's position is not sufficient" to prevent
3 summary judgment. *Triton Energy Corp.*, 68 F. 3d at 1221.

4 **II. Analysis**

5 In filing the complaint, plaintiff invoked the jurisdiction of this Court under admiralty alone,
6 pursuant to 28 U.S.C. § 1331. It is well settled that a marine insurance policy is a maritime contract
7 within federal admiralty jurisdiction. *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 428 n. 4
8 (5th Cir.1980); *Irwin v. Eagle Star Ins. Co.*, 455 F.2d 827, 829 (5th Cir.1972). However, it is generally
9 state law, not federal maritime law, which governs the interpretation of the insurance policies. *Bank of*
10 *San Pedro v. Forbes Westar, Inc.*, 53 F.3d 273, 275 (9th Cir.1995) ("We, like Congress, leave the
11 regulation of marine insurance where it has been---with the States.") (quoting *Wilburn Boat Co. v.*
12 *Fireman's Fund Ins. Co.*, 348 U.S. 310, 321, 75 S.Ct. 368, 99 L.Ed. 337 (1955)). Thus, absent a "federal
13 statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice," state law
14 governs the interpretation of a maritime insurance policy. *Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d
15 506, 509-10 (9th Cir.1984); see also *Kitma AS v. Royal Ins. Co.*, 102 Wash.App. 716, 9 P.3d 239, 242
16 (Wash.Ct.App.2000) (noting that Washington choice of law rules employ the *Wilburn Boat* analysis).
17 The parties have not asserted that federal maritime law governs the interpretation of the policy here.
18 They each contend that state law applies to this Court's interpretation of the policy, but differ as to
19 which state law applies, Washington's or Alaska's. The policy at issue contains no choice of law
20 provision to guide this Court's analysis.

21 In the absence of a contractual choice-of-law clause in the policy, federal courts sitting in
22 admiralty apply federal maritime choice-of-law principles derived from the Supreme Court's decision in
23 *Lauritzen v. Larsen*¹ and its progeny. *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1296-97 (9th
24 Cir.1997) (citations omitted). "Federal common law applies to choice-of-law determinations in cases
25 based on . . . admiralty. . . . Federal common law follows the approach of the Restatement (Second) of
26 Conflicts of Laws." *Id.* at 1297 (citation omitted); see also *Aqua-Marine Constructors, Inc. v. Banks*,

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28 ¹*Lauritzen v. Larsen*, 345 U.S. 571 (1953).

1 110 F.3d 663, 671, 674 (9th Cir.), *cert. denied sub nom. Polaris Insurance Co. v. Aqua-Marine*
2 *Constructors, Inc.*, 522 U.S. 933 (1997).

3 For a contract containing no choice of law provision, the *Restatement* directs consideration of
4 five factors: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of
5 performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence,
6 nationality, place of incorporation and place of business of the parties. Under the *Restatement* approach,
7 these contacts are evaluated according to their relative importance with respect to the particular issue in
8 dispute. *Restatement (Second) of Conflict of Laws*, § 188(2). “[T]he protection of the justified
9 expectations of the parties is of considerable importance in contracts . . .” *Id.* at comment b. If the place
10 of negotiating the contract and the place of performance are in the same state, the local law of this state
11 will usually be applied. *Restatement (Second) of Conflict of Laws* § 188(3). The ultimate goal is to
12 determine, among the “eligible states,” which jurisdiction has the greatest interest in the dispute.
13 *Aqua-Marine*, 110 F.3d at 674.

14 The parties are in agreement that § 188 governs the choice of law here, but they differ in their
15 proposed result of the five-factor analysis. The Court shall address these in turn.

16 (1) Place of contracting: The policy was issued by PSVOA’s broker Accordia in Seattle,
17 Washington. The policy was countersigned at Seattle, and states that it is effective “at place of
18 Issuance” from noon, Pacific Standard Time—not Alaska time. Vikstrom Declaration, Dkt. # 41,
19 Exhibit A, p. 1. While the place of contracting holds little significance where it stands alone or is a
20 fortuitous choice, here it neither is fortuitous nor does it stand alone. *Restatement* § 188, comment e.
21 The place of contracting here would be a significant factor in establishing the parties’ expectations.

22 (2) Place of negotiation: Defendants assert in their answer that the policy was negotiated
23 between Accordia (in Seattle) and a London agent for Lloyds (of which Syndicate 535 is a member).
24 Defendants’ Answer, Dkt. # 8, ¶ 5. The place of negotiation was therefore either Washington or
25 possibly London, but not Alaska. Alaska residents ASI and *F/V Aleutian Spirit* were not a party to the
26 policy negotiations but were added as Individual Certificate Holders under the policy.

27 The place of negotiation diminishes in significance where, as here, there was no single place of
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1 negotiation because this occurred by mail or telephone between two different states. *Restatement* § 188,
2 comment e.

3 (3) Place of Performance: Where, as here, an indemnification policy does not designate a place
4 of performance, an insurer must make payment in the state in which the insured is located. *Certain*
5 *Underwriters at Lloyds, London, v. Inlet Fisheries, Inc.*, 370 F. Supp. 2d 974, 977 (D.Alaska (2004),
6 *citing 2 Couch on Insurance*, § 24:13. The question arises as to who were the “insured,” as the policy
7 lists as insureds PSVOA, SVR, and “Individual Certificate Holders as Declared.” Vikstrom
8 Declaration, Dkt. # 41, Exhibit A, p. 5. The potential ramifications of ambiguity on this question were
9 recognized and discussed by National’s counsel Jay Sever in an evaluation letter dated September 20,
10 2007. Declaration of Christopher Nicoll, Dkt. # 63, Exhibit 3. However, with respect to the question of
11 where payment to the insured was made, the question is resolved by an e-mail string between Mr. Sever
12 and Rob Zuanich, Executive Director of PSVOA at the time of this occurrence. Declaration of Rob
13 Zuanich, Dkt. # 62. These demonstrate that PSVOA “cut the check” in favor of Jason Miller, and then
14 sought reimbursement from the insurers. *Id.*, Exhibit 6. Performance of the obligation from insurer to
15 its insured PSVOA was therefore due in Seattle.

16 (4) Location of contract's subject matter: Defendants argue that the subject of the insurance
17 policy was the vessel located in Alaska, where the Jason Miller accident occurred. As to this dispute,
18 however, the subject matter of the contract was Syndicate 535's and National’s obligation to PSVOA.
19 That was the purpose of the policy, namely to reinsure PSVOA’s obligations to the vessel owners, as
20 pool members. The subject matter of the contract was therefore located in Seattle.

21 (5) Domicile, residence, nationality, place of incorporation, and place of business of the parties:
22 Analysis of these considerations produces a mixed result. ASI, the Millers, and the *F/V Aleutian Spirit*
23 are all Alaskan residents. While they are not actual parties to this suit, their place of residence carries
24 weight in this analysis, as Alaska has a strong interest in matters affecting its residents. Syndicate 535
25 is of British nationality and has its principal place of business in London, England. PSVOA is a
26 Washington corporation. Thus, Washington, Alaska, and England all have some interest in the policy at
27 issue. However, no party has asserted that English law applies, and its limited contacts are of minimal
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1 significance under the *Restatement* approach. Alaska's interest in the matter has been satisfied, as the
2 Jason Miller lawsuit has been settled on his terms, and he has been paid in full. Washington, being the
3 location where the contract was made and performance occurred, as well as the location of the party
4 whose interest is at stake, has the most significant contacts with the insurance policy. The Court
5 therefore determines that Washington law, not Alaska law, applies to the matters at issue here.

6 That is, however, not the end of the matter. Defendants argue that "material factual issues
7 concerning agency, waiver, estoppel, equitable tolling and ratification preclude enforcement of the suit
8 limitation clause on summary judgment. Defendants' Opposition, Dkt. # 60, p. 16. As to the equitable
9 estoppel and/or tolling, the Court agrees.

10 Washington courts have recognized tolling based on equitable estoppel. *Dickson v. United States*
11 *Fidelity & Guaranty*, 77 Wash.2d 785, 788, 466 P.2d 515 (1970) ("The doctrine of equitable estoppel
12 rests on the principle that where a person, by his acts or representations, causes another to change his
13 position or to refrain from performing a necessary act to such person's detriment or prejudice, the person
14 who performs such acts or makes such representations is precluded from asserting the conduct or
15 forbearance of the other party to his own advantage."). The doctrine of equitable estoppel applies in the
16 insurance context if there is "(1) [a]n admission, statement, or act inconsistent with the claim afterwards
17 asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to
18 such other party from allowing the first party to contradict or repudiate such admission, statement, or
19 act." *Logan v. North-West Ins. Co.*, 45 Wash.App. 95, 100, 724 P.2d 1059 (Wash.Ct.App.1986).

20 Defendants have presented as exhibits more e-mails which may indicate that PSVOA was
21 dissuaded from timely filing suit by plaintiff's assurances that it would consider further negotiations.
22 Nicoll Declaration, Dkt. # 63, Exhibits 13-20. The record is incomplete, but these communications raise
23 a factual issue sufficient to defeat summary judgment. Washington courts have found that "estoppel
24 claims implicate factual issues which are not appropriate for resolution on a motion for summary
25 judgment." *Time Oil Co. v. Cigna Property & Casualty Ins. Co.*, 743 F.Supp. 1400, 1419
26 (W.D.Wash.1990).

1 CONCLUSION

2 Plaintiff's motion for summary judgment is accordingly GRANTED IN PART and DENIED IN
3 PART. It is GRANTED to the extent that the Court has determined that Washington law shall apply to
4 the policy of marine insurance. It is DENIED as to a determination that defendants' counterclaims are
5 time-barred, as Washington law directs that equitable tolling and/or estoppel may apply. As to that
6 question, factual issues preclude summary judgment.

7 DATED this 20 day of January 2010.

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9 RICARDO S. MARTINEZ
10 UNITED STATES DISTRICT JUDGE
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